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No. 87-2127

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL.,
APPELLANTS

v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Section 630 of the Treasury, Postal Service and General Appropriations Act for fiscal year 1988 provides that no funds appropriated for that fiscal year may be expended for the implementation or enforcement of any policy, form or agreement concerning the nondisclosure of classified information if the policy, form or agreement (a) contains the term "classifiable" or concerns information other than that which is marked classified or is known by the employee to be classified or to be in the process of a classification determination, or (b) requires prior authorization for an employee to furnish classified information to Congress. The question presented is:

Whether the Court should affirm the district court's judgment denying appellants' request for declaratory or injunctive relief that would bar the enforcement of nondisclosure agreements under Section 630, when recent steps taken by the Executive Branch make clear that appellants are not entitled to relief under certain provisions of Section 630, and the remaining provisions of Section 630 are unconstitutional to the extent they categorically prevent the President from requiring prior authorization before subordinate Executive Branch employees may disclose classified information to a Member of Congress.[1]

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[1] A second question presented on page i of the Jurisdictional Statement is whether the appellants who are individual Members of Congress have standing to seek declaratory or injunctive relief barring implementation or enforcement of nondisclosure forms by Executive Branch agencies. The district court held that they do not (J.S. App. 13a-14a). Appellants do not address the congressional standing question in the body of the Jurisdictional Statement, and we do not believe that the Court must reach it in order to affirm the district court's judgment. See note 22, *infra*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of Steven Garfinkel, Director of the Information Security Oversight Office; William H. Webster, Director of Central Intelligence; and George P. Shultz, Secretary of State, respectfully moves that the judgment of the district court in this case be affirmed.

OPINIONS BELOW

The opinion of the district court dated May 27, 1988 (J.S. App. 1a-36a) is reported at 668 F. Supp. 671, and the opinion of the district court in two related cases dated July 29, 1988 (App., *infra*, 4a-24a) is not yet reported.

JURISDICTION

The judgment of the district court (J.S. App. 37a-38a) was entered on May 27, 1988. The notice of appeal to this Court was

filed on June 3, 1988 (J.S. App. 39a-40a), and the jurisdictional statement was docketed on June 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Article II of the Constitution and Section 630 of the Treasury, Postal Service and General Appropriations Act, 1988 (as enacted by Section 102(m) of the Continuing Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-390, 1329-432), are reproduced at App., *infra*, 1a-3a.

STATEMENT

1. The President has the responsibility and authority under Article II of the Constitution to classify and control access to information bearing on the national defense and foreign relations of the United States and to determine whether an individual is sufficiently trustworthy to be granted access to such information. This authority "exists quite apart from any explicit congressional grant." *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988), slip op. 8; see pages 15-17, *infra*.

As the Court observed in *Egan* (slip op. 9), the Executive Branch has engaged in systematic efforts since World War I to protect national security information; and since World War II, these efforts have been formalized in a series of Executive Orders. See Exec. Order No. 10290, 3 C.F.R. 789 (1949-1953 Comp.); Exec. Order No. 10501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.); Exec. Order No. 12065, 3 C.F.R. 190 (1978 Comp.). The most recent such directive, Executive Order No. 12356, was issued by President Reagan in 1982. 47 Fed. Reg. 14874, 3 C.F.R. 166 (1982 Comp.).

Executive Order 12356 provides for three levels of classification – Top Secret, Secret, and Confidential – based upon the extent of the harm to the national security that could be expected to result from unauthorized disclosure (§ 1.1(a)). The classified status of information generally is to be marked on the face of the document (§ 1.5). If there is reasonable doubt about the

need to classify information, it must be safeguarded as if it were classified pending a classification determination, which must be made within 30 days (§ 1.1(c); see also § 1.2(e)). A person is eligible for access to classified information only if he has been found by a responsible agency official to be trustworthy and only if access "is essential to the accomplishment of lawful and authorized Government purposes" (§ 4.1(a)). Each agency must establish controls to ensure that classified information is used, reproduced, transmitted and destroyed under conditions that will provide adequate protection and prevent access by unauthorized persons (§ 4.1(b)), and classified information may not be disseminated outside the Executive Branch except under conditions that ensure that it will be given equivalent protection (§ 4.1(c)). Agency heads also may create special access programs to protect "particularly sensitive" information (§ 4.2). Officers and employees of the Government (and contractors, licensees, and grantees) are subject to appropriate sanctions if they "knowingly, willfully, or negligently" disclose classified information to unauthorized persons (§ 5.4(b)(1)). Sanctions may include reprimand, suspension without pay, removal, and loss or denial of access to classified information (§ 5.4(c)).

The President directed the National Security Council to provide overall policy direction for the information-security program established by Executive Order 12356, but responsibility for implementation of that program and monitoring for compliance is vested in the Director of the Information Security Oversight Office (ISOO) in the General Services Administration (§ 5.1). The President conferred on the Director of ISOO the authority, inter alia, "to prescribe, after consultation with affected agencies, standard forms that will promote the implementation of the information security program" (§ 5.2(b)(7)). See also 32 C.F.R. 2001-2003.

2. In addition to the foregoing measures instituted by the President pursuant to his inherent authority under Article II of the Constitution, Congress specifically provided when it passed the National Security Act of 1947, ch. 343, 61 Stat. 495, that the Director of Central Intelligence (DCI) "shall be responsible for

protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)). That provision confers broad authority on the DCI to ensure the confidentiality of this especially sensitive information. See *Webster* v. *Doe,* No. 86-1294 (June 15, 1988), slip op. 7-8; *CIA* v. *Sims*, 471 U.S. 159, 170-173 (1985); *Snepp* v. *United States,* 444 U.S. 507, 509 (1980). The DCI has long required individuals who are granted access to information concerning the Central Intelligence Agency (CIA) or its intelligence sources and methods to sign a formal agreement not to disclose such information without prior authorization and to submit any material relating to such information for prepublication review. In *Snepp*, the Court found one of these agreements, which are not directly at issue here, to be an "entirely appropriate" exercise of the DCI's authority to protect intelligence sources and methods and sustained them against a First Amendment challenge (444 U.S. at 509 n.3).

In 1981, the DCI adopted Form 4193, which governs access to Sensitive Compartmented Information (SCI) (J.S. App. 3a n.4).[2] SCI is a subset of classified information involving intelligence sources and methods that consists of "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." DCI Security Committee, *Sensitive Compartmented Information: Characteristics and Security Requirements* 1 (June 1984).[3] Because SCI is extremely vulnerable to countermeasures and compromise, access to such information is strictly controlled and limited only to those who have a need to know particular information. In addition, more stringent standards are applied in determining who may have access to SCI, such that individuals who have been granted access to Top Secret information may nonetheless be denied access to SCI. *Id.* at 1-4; Webster Decl. 2-3, 5-6. These

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[2] Form 4193 is reproduced as Exhibit 5 to Defendants' Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction [hereinafter "Defts' Opp."].

[3] Relevant excerpts from the DCI Security Committee's report are contained in Exhibit A to the Declaration of DCI William H. Webster [hereinafter "Webster Decl."], Defts' Opp., Exh. 4.

special protections for SCI are in accordance with the authorization in Section 4.2 of Executive Order No. 12356 for the DCI to establish special access programs governing particularly sensitive information pertaining to intelligence sources and methods. Webster Decl. 2.

As originally adopted in 1981, Form 4193 described SCI as information that "involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12065 [the predecessor to the current Executive Order 12356] or other Executive order or statute" (¶ 1).[4] Any person who signed Form 4193 acknowledged that "direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of SCI * * * could cause irreparable injury to the United States or be used to advantage by a foreign nation" (¶ 3). The signatory accordingly agreed never to divulge SCI to anyone who is not authorized to receive it without the prior written authorization of the responsible agency (¶ 3) and to submit for security review all materials intended for publication that contain or purport to contain SCI or information relating to or derived from SCI (¶ 4). The signatory further acknowledged that he is obligated by law and regulation not to disclose any other classified information in an unauthorized fashion (¶ 3).

3. In 1982, in response to numerous improper disclosures of classified information, the President established a task force to recommend additional measures for the protection of classified information. The task force's recommendations were approved by the National Security Council and were adopted by the President in National Security Decision Directive (NSDD) 84 (Mar. 11, 1983), Defts' Opp., Exh. 1. NSDD 84 directs each Executive Branch agency to require any person who is to be granted access to classified information to sign a nondisclosure agreement as a condition of access (NSDD ¶ 1.a.). In addition, NSDD 84 requires the Director of ISOO to establish a standard nondisclosure form for use throughout the Executive Branch with

[4] Form 4193 has recently been clarified by substituting for the term "classifiable information" a description of the particular types of information to which that term was intended to refer. See page 13, *infra*.

respect to classified information other than SCI (¶ 1.c). Pursuant to the latter mandate, ISOO adopted Standard Form (SF) 189 in 1983. Defts' Opp., Exh. 2; 32 C.F.R. 2003.20. SF 189, like Form 4193, states that the signatory has been advised and is aware that "direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information * * * could cause irreparable injury to the United States or could be used to advantage by a foreign nation," and the signatory therefore agrees never to divulge such information unless he has officially verified that the recipient has been properly authorized to receive it or he has been given written authorization by the responsible agency (¶ 3). As originally adopted in 1983, SF 189 defined the term "classified information," as used in the agreement, as "information that is either classified or classifiable under the standards of Executive Order 12356 or under any other Executive Order or statute" (¶ 1).[5]

4. On August 17, 1987, the National Federation of Federal Employees filed an action in the United States District Court for the District of Columbia seeking to enjoin the use of SF 189 or any other form using the word "classifiable" to describe the information that signatories are prohibited from disclosing. *NFFE* v. *United States*, Civ. No. 87-2284-OG. The plaintiffs contended, inter alia, that use of the term "classifiable" violates the First Amendment because it is ambiguous and overbroad and would permit an agency to classify information after the employee seeks to disclose it or has already done so. The American Federation of Government Employees filed a similar suit on September 1, 1987, challenging the use of the term "classifiable" in both SF 189 and Form 4193. *AFGE* v. *Garfinkel*, Civ. No. 87-2412-OG.

On December 21, 1987, while the *NFFE* and *AFGE* suits were pending, the Director of ISOO published a regulation in the *Federal Register* to clarify the meaning of the term "classifiable information" in SF 189. That regulation states that the term means:

> (a) Unmarked *classified* information, including oral communications; and (b) *unclassified* information that meets

[5] SF 189, like Form 4193, has recently been clarified by substituting more precise language for the term "classifiable." See page 13, *infra*.

> the standards for classification and is in the process of a classification determination.

32 C.F.R. 2003.20(h)(1)(i) (emphasis in original), as added, 52 Fed. Reg. 48367 (1987).[6]

5. a. One day after the Director of ISOO published the clarification of the term "classifiable," the President signed into law the 451-page, government-wide Continuing Appropriations Act for fiscal year 1988, Pub. L. No. 100-202, 101 Stat. 1329, which included the Treasury, Postal Service and General Appropriations Act, 1988, 101 Stat. 1329-390. Section 630 of the latter Act is a rider, added at the last minute, which purports to impose certain restrictions on the ability of Executive Branch agencies to protect classified information.

Section 630 provides that no funds appropriated in any Act for fiscal year 1988 "may be used to implement or enforce the agreements in Standard Forms 189 or 4193 of the Government or any other nondisclosure policy, form or agreement" that has certain characteristics identified in five succeeding subsections.[7] The first two of these subsections address the use of the term "classifiable" in SF 189 and Form 4193. They provide that appropriated funds may not be used to implement or enforce a policy, form or agreement that "contains the term 'classifiable' " or that "concerns information other than that specifically

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[6] The same regulation further explained (emphasis in original):

> "Classifiable information" does *not* refer to currently unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination. Therefore, the only circumstances under which a party to SF 189 might violate its terms by disclosing *unclassified* information are when a party knows, or reasonably should know, that such information is in the process of a classification determination * * *.

ISOO had previously sought to clarify the meaning of "classifiable" information in notices published on August 3 and 11, 1987, before the *NFFE* and *AFGE* suits were filed. 52 Fed. Reg. 28802, 29793 (1987).

[7] Although Section 630 uses the term "Standard Form" to refer to both SF 189 and Form 4193, the latter is actually not a standard form subject to generally applicable requirements; it was issued pursuant to the special authorities of the DCI.

marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination" (101 Stat. 1329-432). The latter limitations parallel the categories of information to which SF 189 was limited in any event by virtue of the clarification of the term "classifiable" in the regulation published by the Director of ISOO on December 21, 1987, quoted at page 6-7, *supra*. Subsections (3) and (4) of Section 630 address provisions of nondisclosure policies, forms and agreements that may affect disclosures to Congress or its Members.[8] The last prohibition, subsection (5), provides that appropriated funds may not be used to implement or enforce a policy, form or agreement that "imposes any obligations or invokes any remedies inconsistent with statutory law" (101 Stat. 1329-432). A final proviso states that nothing in Section 630 shall affect the enforcement of those aspects of a nondisclosure policy, form or agreement that do not fall within subsections (1)-(5).

b. Appropriate Executive Branch officials promptly took steps to accommodate certain of the concerns reflected in Section 630. Appellee Garfinkel, the Director of ISOO, temporarily suspended further implementation of SF 189 pending advice from the Attorney General. Garfinkel Aff. ¶ 2 (Feb. 8, 1988).[9] He also directed the agencies using SF 189 to notify affected employees that any SF 189 executed after December 22, 1987, would be treated as voidable at the employee's request. Garfinkel Aff. ¶ 3. Similarly, on behalf of the DCI, Lt. General Edward J. Heinz, the Director of the Intelligence Community

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[8] Subsections (3) and (4) apply to a policy, form or agreement that "directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress," or that "interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress" (101 Stat. 1329-432).

[9] The Garfinkel affidavit was attached as Exhibit 7 to the Memorandum in Support of Plaintiffs' Motion For Preliminary Injunction [hereinafter "Pltfs' Mem."].

Staff, issued instructions stating that Form 4193 and any other SCI forms were only to be used when accompanied by a special addendum that read:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 1000[*sic*]-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

Heinz Decl. ¶ 4 (Feb. 9, 1988), Pltfs' Mem., Exh. 6.[10]

c. On March 18, 1988, the DCI replaced Form 4193 with Form 4355. Second Heinz Decl. ¶ 3 & Exh. A (Mar. 24, 1988). Form 4355 does not use the word "classifiable" in describing the SCI to which the signatory's nondisclosure obligation applies. Instead, consistent with subsection (1) of Section 630, Form 4355 describes SCI as information that "involves or derives from intelligence sources or methods and is classified [11] or is in the process of a classification determination under the standards of Executive Order 12356 or other Executive order or statute" (¶ 1). The signatory agrees under Form 4355 that he will never divulge anything marked SCI (or that he knows to be SCI) to anyone not authorized to receive it or without prior written authorization, and that it is his responsibility to consult with appropriate officials in order to ensure that he knows whether information that he has reason to believe might be SCI (or might be related to or derived from SCI) in fact is considered by the agency concerned to be SCI (¶ 2). Instructions issued by Lt. Gen. Heinz provide that agencies may permit persons who signed a Form 4193 (with the addendum) after December 21, 1987, to sign a Form 4355 in its place. Second Heinz Decl., Exh. B.

6. a. On February 19, 1988 (before the DCI issued Form 4355), the appellants herein—the American Foreign Service

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[10] This addendum also was added to the Defense Department's essentially equivalent SCI form, DD 1847-1.

[11] The term "classified" in Form 4355 refers to both marked and unmarked classified information.

Association and seven Members of Congress—filed the instant suit alleging that SF 189 and Form 4193 violate Section 630 of the Treasury, Postal Service and General Appropriations Act for fiscal year 1988. Appellants sought an order declaring that the DCI and the Secretary of State violated Section 630 by continuing to require employees to sign Form 4193 (even with the addendum) after December 22, 1987, and an injunction requiring appellees Garfinkel and Webster to instruct federal agencies (i) to notify all persons who signed an SF 189 or Form 4193 agreement after December 22, 1987, that the agreement is void, and (ii) to notify all employees who signed an SF 189 or Form 4193 agreement at any time in the past that the five terms specified in Section 630 would not be enforced during fiscal year 1988. Complaint 7-8. On March 16 and 17, 1988, the plaintiffs in *AFGE* and *NFFE* amended their complaints to add claims alleging violations of Section 630 as well, and the district court subsequently consolidated the three cases (J.S. App. 2a n.1).

b. The district court considered the consolidated cases in two steps. In the decision at issue here (J.S. App. 1a-36a), which was rendered on May 27, 1988, the court addressed the challenge presented in all three cases based on Section 630 of the 1988 appropriations act. The court did not actually decide whether the actions of the Executive Branch were consistent with Section 630; instead, it assumed for purposes of its decision that the defendant federal officials had violated Section 630, noting that the DCI continued to use Form 4193 after December 22, 1987, albeit with the addendum, until he adopted Form 4355 (J.S. App. 22a-23a n.16).

The district court nevertheless denied any relief under Section 630 because it held that Section 630 is an unconstitutional interference with the President's Article II power to protect national security information (J.S. App. 22a-27a).[12] The court

[12] On a threshold issue of justiciability, the court first held that those appellants who are Members of Congress lack standing to challenge appellees' actions under Section 630 because they can seek relief through the legislative process (J.S. App. 13a-14a). The court found, however, that appellant AFSA and the unions in *NFFE* and *AFGE* do have standing to challenge the form agreements under Section 630, because they alleged that some of their

noted that although Congress is not precluded from "activity relating to national security information" (*id.* at 23a), Section 630 "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations" (*id.* at 27a). The court found subsections (3) through (5) particularly objectionable (*id.* at 26a), because those provisions, which govern communications with Congress and bar enforcement of agreements that impose obligations or invoke remedies inconsistent with statutory law, "permit the President to ensure the secrecy of national security information only by those means authorized by Congress" (*id.* at 27a). Accordingly, the court concluded, "[w]herever may be drawn the line between the political branches in the area of regulating access to national security information, section 630 surely falls within territory where it is not welcome" (*ibid.*). The court therefore granted summary judgment in favor of the appellees in the instant case, since appellants based their challenge to SF 189 and Form 4193 only on Section 630, and it dismissed the corresponding counts in the *NFFE* and *AFGE* complaints (J.S. App. 27a-28a, 37a-38a).[13]

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individual members have been chilled in the exercise of their First Amendment rights as a result of the continued implementation and threatened enforcement of the agreements (J.S. App. 14a-18a). The court further found that two of the three individual plaintiffs in *AFGE* who signed the forms in question prior to December 22, 1987, have standing to raise the Section 630 claim (*id.* at 18a-19a). Finally, the court held that the unions and individual plaintiffs in *NFFE* and *AFGE* have standing to challenge the constitutionality of the nondisclosure agreements under the First Amendment (*id.* at 20a-22a).

[13] The district court also rejected several additional claims advanced only by the plaintiffs in *NFFE* and *AFGE*. First, the district court held that the nondisclosure agreements do not violate the whistleblower provision of the Civil Service Reform Act, because that provision excepts from its coverage any disclosure by an employee of information that is " 'specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs' " (J.S. App. 30a-31a, quoting 5 U.S.C. 2302(b)(8)(A)) and because enforcement of the whistleblower provision is in any event committed to the Special Counsel of the Merit Systems Protection Board (see 5 U.S.C.

7. In a subsequent ruling (App., *infra,* 4a-24a), rendered in *NFFE* and *AFGE* on July 29, 1988 (after the notice of direct appeal to this Court was filed in the instant case), the district court held that the term "classifiable" as used in SF 189 and Form 4193 is not unconstitutionally vague under the First Amendment if its scope is clarified in accordance with the definition published in the *Federal Register* by the Director of ISOO in December 1987 (App., *infra,* 10a-20a). The court further held, however, that SF 189 and Form 4193 cannot be enforced with respect to "classifiable" information unless the employees who have signed those forms are individually informed of that clarification or the term "classifiable" is deleted from the agreements (*id.* at 20a).[14]

8. On September 29, 1988, the Director of ISOO published regulations in the *Federal Register* setting forth the manner in

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1206(c)(1)(A)) rather than a private right of action (J.S. App. 30a-31a). Second, the court rejected as frivolous claims that the nondisclosure agreements conflict with an uncodified code of ethics, Act of July 3, 1980, Pub. L. No. 96-303, § 3, 94 Stat. 855 (J.S. App. 31a-32a), the Copyright Clause of the Constitution, Art. I, § 8, Cl. 8 (J.S. App. 33a), and the Freedom of Information Act, 5 U.S.C. 552 (J.S. App. 34a). Third, the court dismissed for failure to state a claim under the Administrative Procedure Act (5 U.S.C. 706(2)) the contention that Form 4193 violates NSDD 84 (J.S. App. 32a). Fourth, the court ruled that differences between SF 189 and SF 189-A (a form used for employees of government contractors) are rational and therefore do not impermissibly discriminate against federal employees (J.S. App. 28a-30a).

[14] The court also rejected the contention by the *NFFE* and *AFGE* plaintiffs that the regulation published by ISOO in December 1987 violates the First Amendment because it bars negligent disclosures and disclosures of information that the employee should know is classified or in the process of a classification determination. The court explained that "[t]he reasonable person standard is the one to which people are held in all of their activities, and it does not become unconstitutionally vague simply because First Amendment rights are involved" (App., *infra,* 19a). Similarly, the court rejected the claim by the *AFGE* plaintiffs that the agreements violate 5 U.S.C. 7211—which provides that the right of employees to petition Congress or a Member of Congress, or to furnish information to a House, committee or Member of Congress, may not be interfered with or denied—because the plaintiffs failed to allege that they have disclosed or intend to disclose some classified or classifiable information to Congress and have for that reason been threatened with enforcement of the nondisclosure agreements (App., *infra,* 21a-22a).

which he will implement the district court's July 29, 1988, order. 53 Fed. Reg. 38278, amending 32 C.F.R. 2003.20. The regulations clarify paragraph 1 of all outstanding SF 189 agreements by substituting for the term "classifiable information" a more precise description of the categories of information to which that shorthand label was intended to refer: "unmarked classified information (including oral communications), and unclassified information that meets the standards for classification and is in the process of a classification determination" (32 C.F.R. 2003.20(h)(1)). The new ISOO regulations also state the basis on which an employee may be held liable for an unauthorized disclosure—namely, if he knew or reasonably should have known that the information he disclosed was classified or in the process of a classification determination (32 C.F.R. 2003.20(h)(3)). On September 26 and 30, 1988, instructions were issued on behalf of the DCI to clarify the existing Form 4193 agreements by substituting similar language for the term "classifiable" and to require appropriate government officials to notify employees who have signed that form of these changes. Pursuant to a further order of the district court entered on September 26, 1988, in *NFFE* and *AFGE*, the agencies must furnish individualized notice of the clarification to employees who have signed SF 189 and Form 4193 agreements by October 27, 1988.

In addition, on a prospective basis, the Director of ISOO has replaced SF 189 with SF 312, effective September 29, 1988 (32 C.F.R. 2003.20(a)). SF 312 omits the term "classifiable" and refers instead only to "classified" information (which includes unmarked classified information) and information that meets the standards for classification and is in the process of a classification determination. Any person who has signed an SF 189 will be permitted to sign an SF 312 if he wishes to do so (32 C.F.R. 2003.20(b)).[15]

9. Because Section 630 was enacted as a rider to an appropriations law for fiscal year 1988, it effectively expired on September 30, 1988. On September 22, 1988, however, the

[15] As explained above (see page 9, *supra*), Form 4193 was previously replaced on a prospective basis by Form 4355, which also omits the word "classifiable."

President, with serious reservations, signed the Treasury, Postal Service and General Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721. Section 619 of that Act contains restrictions on the expenditure of appropriated funds for the implementation or enforcement of nondisclosure policies, forms and agreements in fiscal year 1989 that are identical to those in Section 630 of the 1988 appropriations act. In signing the bill, the President noted his constitutional objections to Section 619, explaining that "[o]ur Nation's security depends upon our success in diplomatic, military, and intelligence activities, and that success depends upon our ability to protect the Nation's secrets" (24 Weekly Comp. Pres. Docs. 1189). The President further observed that he has "the constitutional responsibility to ensure the secrecy of information whose disclosure would threaten our national security" (*ibid.*). For these reasons, the President directed that in accordance with his sworn obligation to preserve, protect, and defend the Constitution (see Art. II, § 1, Cl. 8), Section 619 will be considered to be of no force and effect unless and until this Court reverses the ruling of the district court in the instant case holding the identical provisions in Section 630 of the 1988 Act unconstitutional (24 Weekly Comp. Pres. Docs. 1189).

ARGUMENT

The district court correctly denied appellants' request for declaratory and injunctive relief under Section 630 that would broadly bar enforcement of confidentiality obligations that have been solemnly undertaken by employees of the Executive Branch as a condition of access to information relating to the national security of the United States. The steps taken by the Director of Central Intelligence and the Director of the Information Security Oversight Office to substitute more precise language for the term "classifiable" in existing and future nondisclosure agreements meet the principal concerns that led to the enactment of Section 630 and eliminate any basis for appellants' contentions that the enforcement of existing nondisclosure agreements must be enjoined because they are inconsistent with subsections (1) and (2) of Section 630. Accordingly, in the present posture of this case, there is no ocassion for the Court to

consider broad questions concerning Congress's power to limit the types of information that may be protected by the President in the interest of national security or to specify the precise formulation of the nondisclosure obligations that the President may require of Executive Branch personnel.

The only remaining issue is appellants' contention that subsections (3)-(5) of Section 630 justify government-wide declaratory and injunctive relief barring enforcement of any limitations that the President might impose (through nondisclosure agreements) on the furnishing of classified information by Executive Branch employees to Members of Congress. However, the district court was clearly correct in holding that Congress may not categorically prevent the President from insisting that those employees who have access to highly sensitive information must at least seek the prior approval of a responsible official under the President's supervision before divulging national security information to anyone, including a Member of Congress. Indeed, in light of the serious constitutional questions raised, it is far from clear that Section 630 should be construed to have that effect. But if the Court does not reject appellants' position outright, on either constitutional or statutory grounds, it should nevertheless deny appellants' request for sweeping declaratory or injunctive relief in the highly abstract context of this case. This case does not involve any instance in which an Executive Branch employee actually sought but was denied authorization to make a particular disclosure to a Member of Congress, or was disciplined for making such a disclosure without seeking or obtaining prior authorization. For this reason alone, a court may properly deny equitable relief. The judgment of the district court denying such relief therefore should be affirmed.

1. a. The President has the "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information" (*Department of the Navy* v. *Egan,* slip op. 8). This authority "exists quite apart from any explicit congressional grant" (*ibid.*); it derives instead from the

President's constitutionally assigned roles as the head of the Executive Branch (and therefore the repository of the "executive Power" (Art. II, § 1)), as the "Commander in Chief of the Army and Navy of the United States" (Art. II. § 2),[16] and as the " 'sole organ of the nation in its external relations' " (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), quoting 6 Annals of Cong. 613 (1800) (remarks of John Marshall)).[17] In fact, the Court has repeatedly recognized that there is a " 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." *Egan*, slip op. 8, quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n. 3 (1980); see also *United States* v. *Robel*, 389 U.S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Totten* v. *United States*, 92 U.S. 105, 106 (1875). See also *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), slip op. 7-8.

The President's power to protect classified information and his status as the head of the Executive Branch and Commander-in-Chief necessarily confer on him the right to insist that those who serve as his agents[18] will exercise the utmost care in handling classified information and will seek and obtain the approval of responsible officials before disclosing it to others who have not already been specifically granted accesss to it. As Justice Stewart observed in his concurring opinion in *New York Times Co.* v. *United States*, 403 U.S. 713, 728-730 (1971):

> The responsibility [for protecting classified information] must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct

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[16] See also *United States* v. *United States District Court*, 407 U.S. 297, 310 (1972) (The President has "the fundamental duty, under Art. I, § 1, of the Constitution, to 'preserve, protect and defend the Constitution.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means.").

[17] See also *United States* v. *Pink*, 315 U.S. 203, 222-223, 228-230 (1942); *Goldwater* v. *Carter*, 444 U.S. 996, 1002-1006 (1979) (Rehnquist, J., concurring in the judgment).

[18] In the case of officers and employees of the Department of Defense, the Department of State, the CIA, and other entities who assist the President in the area of national defense and foreign relations, " 'their acts are his acts'." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 631 (1935) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803)).

> of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. * * * [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibility in the fields of international relations and national defense.

See also *Cole* v. *Young*, 351 U.S. 536, 546 (1956). The Executive Orders issued by the President since World War II (see page 2, *supra*) have implemented the President's inherent constitutional authority to protect and control access to classified information, and they have codified the standards to which his subordinates are expected to adhere. See *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1192-1198 (1972).

b. After a thorough study within the Executive Branch, the President concluded in 1983 that nondisclosure agreements such as those at issue here serve essential functions in protecting information relating to the national security. Such agreements clearly define the personal obligations of the officers and employees who will be granted access to national security information, and assure that each employee fully appreciates the exacting nature of the trust relationship he is assuming with the United States Government and the consequences that may result from a breach of that trust. See *Snepp*, 444 U.S. at 510-511 & nn. 5-6, 515; *Webster* v. *Doe*, slip op. 7-8; Webster Decl. ¶ 8. For these reasons, the President required in NSDD 84 that all employees who have access to SCI and other classified information must sign a nondisclosure form as a condition of access. Just as this Court held in *Snepp* that such agreements are an "entirely appropriate" way for the DCI to implement his statutory duty to protect intelligence sources and methods from unauthorized disclosure (444 U.S. at 509 n.3), they are also an

entirely appropriate way for the President to implement his constitutional duty to protect classified information generally, by setting forth the standards to which Executive Branch employees would be held under Executive Order 12356 even in the absence of a written agreement. Appellants do not contend otherwise.

2. a. Although NSDD 84 caused some concerns in certain other respects, the final implementation of the government-wide nondisclosure form (SF 189) in 1983 did not generate significant public opposition. See *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service,* 100th Cong., 1st Sess. 62-63, 76-77 (1987) [hereinafter *1987 Hearing*].[19] In 1987, however, some Executive Branch employees and Members of Congress began to express reservations regarding the use of the term "classifiable" in SF 189 (and Form 4193), because they believed that the term was vague and overbroad and therefore might impermissibly chill the exercise of First Amendment rights, and that the term might allow an agency to classify information after it has been disclosed, in order to punish the employee who disclosed it. It was those concerns that led to the filing of the *NFFE* and *AFGE* suits in August and September 1987 and to the last-minute insertion of Section 630 into the Continuing Appropriations Act for 1988 in December 1987. See note 20, *infra;* see generally *1987 Hearing* 1-3, 5, 8-17, 22, 42-44, 53-56, 59, 63, 76-79, 84, 94-98, 103-110, 112, 116, 122, 133, 148, 151-154. The clarification of the term "classifiable" by the Director of ISOO in his *Federal Register* notice dated December 21, 1987, was intended to alleviate those concerns.

More recently, the DCI and Director of ISOO have gone even further, completely eliminating the word "classifiable" from the existing SF 189 and Form 4193 and the new SF 312 and Form 4355. In its place, the DCI and Director of ISOO have substituted a more precise description of the three categories of

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[19] Unlike Forms 4193 and 4355 and the agreements at issue in *Snepp*, SF 189 and SF 312 do not contain a prepublication review requirement.

information to which the nondisclosure obligation applies: (i) information that is marked classified, (ii) information that is unmarked but classified (including oral communications), and (iii) information that is in the process of a classification determination. See pages 9 and 13, *supra*. These clarifications, of which all employees who signed SF 189 or Form 4193 will be notified, ensure that the agreements are narrowly drawn and will be fully understood by the signatories to apply only to those categories of information that are at the core of the President's constitutional duty to protect the national security. Because the word "classifiable" has been completely eliminated from the forms, there no longer is any live controversy in this case under subsection (2) of Section 630, which purports to render that term unenforceable. And because the three categories of information specified by the DCI and the Director of ISOO are the same as those specified in subsection (1) of Section 630 as proper subjects of nondisclosure agreements, the recent clarifications by the DCI and Director of ISOO also make clear that appellants are not entitled to any relief on their claim that the existing SF 189 and Form 4193 agreements cover information beyond that identified in subsection (1). The DCI and Director of ISOO therefore have fully met the principal concerns that led to the enactment of Section 630.[20]

In light of these steps taken by the responsible Executive Branch officials, which have the effect of bringing nondisclosure forms into harmony with the first two subsections of Section 630, there is no occasion in this case for the Court to address broad questions concerning the power of Congress to circumscribe the types of information relating to the national security that the President may constitutionally require his sub-

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[20] That these were Congress's principal concerns is evident from the fact that Senator Grassley, a leading congressional critic of the word "classifiable" in then-existing forms, had sought to resolve the controversy by proposing a definition identical to that subsequently published by the Director of ISOO (see *1987 Hearing* 10-12, 101) and, as noted in the text, subsection (1) of Section 630 manifests agreement with that definition. See also Affidavit of Senator Charles E. Grassley at 2-4 (Nov. 18, 1987), Pltfs' Mem., Exh. 11.

ordinates to keep confidential.[21] Nor is there any occasion for the Court to consider the power of Congress to prescribe the details or modify the enforceability of particular nondisclosure agreements.

b. Appellants note in passing (J.S. 12-13) that subsection (1) of Section 630 permits the use of appropriated funds to implement or enforce a policy, form or agreement only if it concerns information that is specifically marked as classified or that is unmarked but is "known" by the employee to be classified or in the process of a classification determination. It is unclear whether appellants' references to the word "known" are intended to constitute a challenge to the district court's judgment insofar as it would permit the President to insist that employees not disclose sensitive information that they do not actually know but *should* know is classified or in the process of a classification determination. Any such challenge, however, would be without merit for several reasons.

First, appellants' objection, to the extent they raise it, should not be considered in the context of this case, which presents a challenge to the content of the forms themselves. Forms SF 189 and SF 312 do not address the question of the standard of care required of an employee in handling information protected by the Executive Order. The standard of care is instead discussed in regulations issued by the Director of ISOO. Those regulations provide that a person who has signed an SF 189 or 312 "may be liable for disclosing 'classified information' only if he or she

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[21] Contrary to appellants' contention (J.S. 11), the district court did not "essentially preclude[] Congress from placing any restrictions on the Executive Branch's power to limit the disclosure of national security information, even if such information has not been classified under the President's own classification rules." The district court stated that even the government's position "does not preclude congressional activity relating to national security information" (J.S. App. 23a). Moreover, by the time of the district court's decision, the DCI and Director of ISOO had clarified the nondisclosure-agreement forms to make clear that they apply only to information that is protected by the Executive Order. See pages 6-7, 9, *supra*.

knows or reasonably should know" that unmarked information is classified or meets the standards for classification and is in the process of a classification determination. 32 C.F.R. 2003.20(h)(3), as added, 53 Fed. Reg. 38279 (Sept. 29, 1988); see also 52 Fed. Reg. 48367 (1987). Form 4355 takes a slightly different approach: it states that an employee may not disclose information that he knows to be classified or in the process of a classification determination, but it imposes on the employee a duty to ascertain the status of any information that he has reason to believe might be SCI or related to or derived from SCI (¶ 3). Finally, Form 4193 simply states that negligent handling of SCI could cause irreparable injury to the United States; it does not spell out in detail the circumstances in which measures might be taken against a person who discloses information. Thus, if appellants actually intend to argue that subsection (1) of Section 630 absolves an employee of any legal obligation unless he actually *knows* that information is classified or meets the standards for classification and is in the process of a classification determination, that argument should be directed not to the forms themselves, but to any measures that might be taken in the future against an employee who makes an unauthorized disclosure. Issues concerning such measures are not ripe for resolution in the abstract posture of this case. See pages 27-28, *infra*.

In any event, appellants are surely wrong if they do intend to argue that Congress may constitutionally bar the President from disciplining an Executive Branch employee—or even denying him further access to classified information—if the employee makes an unauthorized disclosure of national security information that is "only" negligent or reckless. As we have explained above (see pages 15-17, *supra*), the Constitution itself confers on the President the authority to classify and control access to information bearing on the national defense and foreign relations of the United States. " 'As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities' " (*Egan*, slip op. 11, quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)). The courts therefore cannot lightly disable the President from taking measures that

he concludes are necessary to protect such information—including measures designed to prevent negligent or reckless as well as knowing disclosures. The Constitution expressly imposes a duty on the President to "take Care" that the laws be faithfully executed (Art. II, § 3). In order to fulfill that obligation, the President must have the ability to impose a comparable duty of care on the subordinate Executive Branch employees who serve as his agents. Even where the President's power to remove Executive Branch officers is subject to limitation by Congress, the President's duty to "take Care" requires at a minimum that he be able to remove (or to direct the removal of) a subordinate official for "cause." See *Morrison* v. *Olson*, No. 87-1279 (June 29, 1988), slip op. 33-34. The careless handling of national security information by an employee holding a position of the highest degree of trust would unquestionably be "cause" for some disciplinary action, and such conduct would also be an appropriate basis for denying the employee further access to national security information. See *Webster* v. *Doe*, slip op. 7-8; *Egan*, slip op. 8-11. The court below therefore correctly declined to grant declaratory or injunctive relief that would broadly and peremptorily frustrate the President's ability to take measures that will ensure that Executive Branch employees are punctilious in protecting the confidentiality of classified information.

3. All that remains, then, is appellants' contention (J.S. 13-14, 18-19) that Section 630 justifies the award of broad declaratory and injunctive relief barring enforcement of the nondisclosure-agreement forms insofar as they prohibit Executive Branch employees from furnishing national security information to Members of Congress without seeking prior approval of the Executive Branch officials who are ultimately responsible for such information. Appellants principally rely on subsection (3) of Section 630, which bars the expenditure of appropriated funds to implement or enforce any nondisclosure policy, form or agreement that "directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with members of Congress in a

secure manner as provided by the rules and procedures of the Congress."[22] For a number of reasons, this provision does not furnish a basis for the relief appellants seek.

a. First, Congress plainly does not have the constitutional authority to adopt a categorical rule that would absolutely bar

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[22] Subsections (4) and (5) do not support appellants' argument in this respect. Subsection (4) provides that appropriated funds may not be spent for the implementation of any policy, form or agreement that "interferes with the right of Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress." As an initial matter, no claim under subsection (4) is properly before the Court, because appellant AFSA and its members do not have standing to raise a claim concerning the right of Congress to receive information, and individual Members of Congress do not have standing to vindicate the rights of Congress as a whole (see J.S. App. 13a-14a). Moreover, as the district court recognized (J.S. App. 26a), the requirement that an employee obtain prior approval before he discloses information to anyone, including a Member of Congress, does not interfere with any "right" of Congress to receive information from the Executive Branch. Any "right" of Congress in this regard must ultimately be vindicated through official channels, such as by the issuance of a subpoena, which will trigger a response from the agency head or other authorized official. Cf. *Touhy* v. *Ragen*, 340 U.S. 462 (1951). Therefore, even if appellants had standing to raise this claim, they would not be entitled to relief under subsection (4).

Subsection (5) of Section 630 provides that appropriated funds may not be used for any policy, form or agreement that "imposes any obligations or invokes any remedies inconsistent with statutory law." The statutory law upon which appellants rely (J.S. 14, 19) is the whistleblower provision of the Civil Service Reform Act which—although it does not protect an employee who discloses classified information (5 U.S.C. 2302(b)(8)(A))—does provide that it "shall not be construed to authorize * * * the taking of any personnel action against an employee who discloses information to the Congress" (5 U.S.C. 2302(b) (final sentence)). The quoted language, however, does not affirmatively confer a right on an employee to disclose classified information to Congress or afford protection to an employee who does so, and indeed the whistleblower provision itself (5 U.S.C. 2302(b)(8)(A) and (B)) does not even expressly refer to disclosures to Congress. Because the requirement that an Executive Branch employee receive prior authorization before divulging national security information to a Member of Congress therefore does not conflict with the whistleblower statute, it does not conflict with subsection (5) of Section 630. For this reason, the district court properly declined to enter declaratory or injunctive relief based on that subsection.

the President from insisting that subordinate officers and employees in the Executive Branch must seek prior authorization before transmitting classified information to anyone, including a Member of Congress, who has not already been officially authorized to receive it. Such a rule would be nothing less than a frontal assault on the President's constitutional authority to exercise control over national security information in the Executive Branch and over communications with the coordinate Branches regarding such information.

Under the Constitution, the decision whether to disclose national security information to a person who has not already been authorized to receive it does not rest with each individual employee or former employee of the CIA or other government agency, acting alone. Such decisions are the responsibility of the President or by the Executive Branch officials who have been formally charged by the President with acting as his principal agents in the areas of national defense and foreign relations, with protecting sensitive information acquired in the course of that activity, and with supervising the activities of the lower-level employees who have been granted access to the information. Only in this way can the President and his principal advisers be responsible—and thereby be held accountable—for decisions concerning the disclosure of classified information, as well as all other decisions made in the performance of these functions that Article II assigns to the President.

As this Court explained in *Curtiss-Wright*, 299 U.S. at 320:

> [The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of

> the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted.

This constitutionally based privilege for national security information is well recognized in modern cases (see *United States* v. *Nixon*, 418 U.S. 683, 710-711 (1974); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953)), and, in accordance with the precedent established by President Washington, applies in full measure to the President's relations with Congress. *United States* v. *AT&T*, 567 F.2d 121, 129 (D.C. Cir. 1977).

Because the privilege derives from the President's constitutional authority, the determination whether to invoke it and how to furnish information if it is not invoked must ultimately reside with the President or the head of the department or agency under the President's direct supervision, not with a low-level employee acting entirely on his own. In *Touhy* v. *Ragen*, *supra*, the Court sustained regulations issued by the Attorney General that barred an individual employee of the Department of Justice, without prior authorization, from furnishing official information of the Department in response to a judicial subpoena. The Court explained (340 U.S. at 468):

> When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious.

A fortiori, these same considerations require a centralized determination of whether sensitive information affecting the national security will be disclosed to persons who have not already been specifically authorized to receive it. See *Reynolds*, 345 U.S. at 7-8 (state secret or military privilege cannot be waived by private party and must be invoked by head of agency). These considerations are not rendered inapplicable merely because the disclosure would be made to Congress, rather than the courts. Congress could not, for example, have constitutionally cir-

cumvented President Washington's decision to withhold documents containing his instructions to the negotiators of the Jay Treaty by enacting a law that purported to confer a "right" on lower-ranking Executive Branch employees (perhaps the negotiators themselves) to furnish the information to Congress without prior authorization by the President, and purported to bar the President from taking any measures against an employee who exercised that "right."

For the foregoing reasons, the Court should reject appellants' reliance on Section 630 in support of their facial challenge to the nondisclosure forms insofar as those forms require prior authorization before an Executive Branch employee may divulge national security information to a Member of Congress.

b. Second, especially in view of the grave constitutional questions that are raised by appellants' argument, it is far from clear that subsection (3) should be read to *confer* a "right" on an Executive Branch employee to divulge national security information to a Member of Congress at will, without even attempting to invoke established channels of official communication. Subsection (3) instead can be read simply to take as a given (and to afford protection to) whatever "right" to petition or supply information to Congress that an individual might derive from some independent legal source, such as the First Amendment. If subsection (3) is read in this way, it is necessary to look outside of that provision to determine whether an Executive Branch employee has such a right.

Surely the First Amendment does not confer an unfettered right on an employee of the Executive Branch to disclose whatever national security information he pleases outside authorized channels, whether to a member of the public or to a Member of Congress. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984); *Touhy* v. *Ragen*, 340 U.S. 462 (1951); cf. *Connick* v. *Myers*, 461 U.S. 138 (1983). Specifically, the executive departments and agencies have inspectors general or other officials to whom federal employees may communicate information concerning activities that they believe to be unlawful. See also Exec. Order No. 12334, 3 C.F.R. 216 (1981 Comp.)(establishing the President's Intelligence Oversight Board). The departments and

agencies also have officials who are authorized to consider an employee's request to declassify information. Those mechanisms furnish employees with procedures for the reporting of improper activities and petitioning their government. Moreover, if an employee seeks official approval to communicate information to Congress, there is no reason to believe that such approval will neccessarily be denied. Indeed, the provision for prior approval serves important functions by affording the agency itself an opportunity to correct the problem the employee has identified (cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975)) and to assure that any communication to Congress is channeled in a manner that minimizes the security risk. Compare 50 U.S.C. 501; cf. S. Rep. 99-522, 99th Cong., 2d Sess. 91, 94 (1986). There accordingly is no basis for concluding that a requirement that an employee seek prior approval before communicating classified information to anyone, including a Member of Congress, violates any First Amendment "right" of an Executive Branch employee. Such a requirement therefore does not violate subsection (3) of Section 630, if construed in the manner suggested herein.

c. Finally, even if subsection (3) of Section 630 is construed to confer a statutory right on all Executive Branch employees to communicate classified information directly to Members of Congress without prior authorization, the Court could deny appellants relief on equitable grounds without holding subsection (3) unconstitutional. Appellants assert an absolute statutory right that would intrude deeply into the constitutional authority of the President, discussed above (see pages 15-17, *supra*), to supervise his agents in the Executive Branch and their handling of national security information. At the very least, that argument raises profound separation-of-powers concerns. Yet appellants advance it in this case in an exceedingly abstract and speculative context, since the Court does not have before it any concrete instance in which an employee has sought but been denied authorization to disclose information to a Member of Congress or has been disciplined or denied further access to classified information because he made such a disclosure without seeking or obtaining prior approval.

The Court has repeatedly made clear that the award of injunctive or declaratory relief is not a matter of right, but rather is an equitable remedy committed to the sound discretion of the district court, in light of the public interests involved. See *Webster* v. *Doe*, slip op. 11; *id.* at 8 (Scalia, J., dissenting); *Hewitt* v. *Helms*, No. 85-1630 (June 19, 1987), slip op. 6-7; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). This case presents a compelling occasion for the courts to deny equitable relief, in accordance with the Court's traditional reluctance "to decide important questions regarding 'the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case.' " *Kleppe* v. *New Mexico*, 426 U.S. 529, 546 (1976) (quoting *Longshoremen* v. *Boyd*, 347 U.S. 222, 224 (1954)); see also *Public Affairs Press* v. *Rickover*, 369 U.S. 111, 112-113 (1962). That is especially so in view of the fact that the statutory provision upon which appellants rely is not permanent legislation that confers rights directly on private parties, but rather is written as a temporary restriction on the manner in which federal agencies may spend appropriated funds. Compare *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979). Accordingly if the Court does not reject appellants' claim outright, as a matter of either constitutional law or statutory construction, it nevertheless should, on equitable grounds, affirm the district court's judgment denying appellants' claim for sweeping declaratory and injunctive relief.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1988

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article II of the United States Constitution provides in relevant part:

> SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *
>
> * * * * *
>
> [Clause 8.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: —"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."
>
> SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *
>
> [Clause 2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *
>
> * * * * *
>
> SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; * * * he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, * * *.

2. Section 630 of Treasury, Postal Service and General Appropriations Act, 1988, 101 Stat. 1329-432,[1] provides:

> No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 or 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

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[1] The Treasury, Postal Service and General Appropriations Act, 1988, was enacted by Section 102(m) of the Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-390.

(5) imposes any obligations or invokes any remedies inconsistent with statutory law: *Provided,* That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-2284-OG

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Civil Action No. 87-2412-OG

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, ET AL., PLAINTIFFS

v.

STEVEN GARFINKEL, ET AL., DEFENDANTS

[Filed July 29, 1988]

MEMORANDUM

In lengthy complaints, plaintiffs in these consolidated cases[1] allege numerous violations of the Constitution and

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[1] Hereinafter, *National Federation of Federal Employees v. United States*, Civil Action No. 87-2284 (D.D.C. filed Aug. 17, 1987) shall be referred to as *NFFE* and *American Federation of Government Em-*

statutes by reason of a federal government program that requires federal employees to sign agreements in which the employees pledge not to disclose classified information without authorization. The plaintiffs are two labor unions that represent many federal employees and three individuals who have signed or been directed to sign one of these agreements. In a memorandum and order filed May 27, 1988, the Court substantially pared the complaints, leaving claims under the First and Fifth Amendments to the Constitution, the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and 5 U.S.C. § 7211, which guarantees to federal employees the right to petition Congress.

Before the Court are defendants' Motion to Dismiss, plaintiffs' Motion for Summary Judgment, and plaintiff Brase's further Motion for Summary Judgment. Because the Court has considered evidence extrinsic to the pleadings and the parties have had adequate opportunity to make such submissions, the defendants' Motion to Dismiss will be treated as a Motion for Summary Judgment. *See Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978); Fed. R. Civ. P. 12(b). The Court's action on these motions will resolve all of plaintiff's remaining claims.

I. BACKGROUND

In August and September of 1987, plaintiffs filed these cases to enjoin implementation and enforcement of the provisions of federal government Standard Forms 189 ("SF 189") and 4193 ("SF 4193") and Department of Defense form DD 1847-1. With important differences, these forms contain an agreement that imposes civil sanctions on the federal employee signatory for making unauthor-

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Employees v. Garfinkel, Civil Action No. 87-2412 (D.D.C. filed Sep. 1, 1987) shall be referred to as *AFGE*.

ized disclosures of certain government information. The SF 189 is used generally throughout the Executive Branch and is administered by the Information Security Oversight Office ("ISOO"). Exhibit 3 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction. The Director of Central Intelligence ("DCI") uses the SF 4193 for employees who have access to Sensitive Compartmented Information ("SCI").[2] Exhibit 5 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction. The DD 1847-1 is essentially the same as the SF 4193 and is presented to the same type of employees. Exhibit 4 to Defendants' Motion to Dismiss (filed Dec. 15, 1987).

The forms were prepared after a report by an Interdepartmental Committee of the Executive Branch suggested that civil penalties would deter unauthorized revelation of classified information. REPORT OF THE INTERDEPARTMENTAL GROUP ON UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION A-6 (Mar. 31, 1982); *see* National Security Decision Directive 84 ¶ 1 (Mar. 11, 1983) [hereinafter NSDD 84]. The nondisclosure agreements embodied in the forms became a part of the Executive's comprehensive scheme for safeguarding national security information—a scheme that has its roots in the early years of this century. *See* Exec. Order No. 12,356, *reprinted in* 47 Fed. Reg. 14,874 (Apr. 2, 1982) [hereinafter Exec. Order 12,356]; *see also Developments in the Law—The National Security Interest and Civil Liberties,* 85 HARV. L. REV. 1130, 1193-94 (1972) (as early as World War I, Executive implemented scheme to protect national security

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[2] Both the SF 4193 and the DD 1847-1 refer expressly to SCI. Although such information is a subcategory of classified information, the distinction is generally not relevant to plaintiffs' claims. Throughout this memorandum, SCI will be distinguished from the general category of classified information only when the distinction is material.

information). Plaintiffs attack this recent addition to the scheme on the grounds that certain language in the forms impermissibly intrudes upon the First and Fifth Amendment rights of signatories to the forms. Of less substantial dimension are plaintiffs' additional claims that promulgation of the forms was arbitrary, capricious, and contrary to law, 5 U.S.C. §§ 701-706, and that the restrictions imposed by the forms violate a statutory assurance that federal employees may communicate with Congress without interference. 5 U.S.C. § 7211.

In all, three provisions of the forms are the subject of these constitutional and statutory challenges. First, each of the forms uses the term "classifiable" to describe the type of information that implicates the obligations imposed by the forms. The SF 189, for example, states:

> As used in this Agreement, *classified information is information that is either classified or classifiable under the standards of Executive Order 12356,* or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security.

SF 189 ¶ 1 (emphasis added). Also common to the forms is paragraph three which suggests that "indirect unauthorized disclosure" of classified information is a violation of the federal employee's obligation to protect such information. Finally, the SF 4193 and DD 1847-1 contain a prepublication review provision:

> In consideration of being granted access to Sensitive Compartmented Information and of being assigned or retained in a position of special confidence and trust requiring access to Sensitive Compartmented Information, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information, all information

> or materials, including works of fiction, which contain or purport to contain any Sensitive Compartmented Information or description of activities that produce or relate to Sensitive Compartmented Information or that I have reason to believe are derived from Sensitive Compartmented Information, that I contemplate disclosing to any person not authorized to have access to Sensitive Compartmented Information or that I have prepared for public disclosure.

DD 1847-1 ¶ 4.

Since the plaintiffs' initial assault on these provisions, some changes have been made to the forms. In response to complaints that "classifiable" is unconstitutionally vague and overbroad, the ISOO made several attempts to refine the definition. The most recent definition declares:

> As used in paragraph 1 of SF 189, the term "classifiable information: refers to two categories of information only: (a) Unmarked *classified* information, including oral communications; and (b) *unclassified* information that meets the standards for classification and is in the process of a classification determination.

52 Fed. Reg. 48,367 (Dec. 21, 1987) (emphasis in original) (amending 32 C.F.R. § 2003.20(h)(1)(i)).[3] Shortly after this supposed improvement, the implementation and enforcement of the forms were suspended entirely in response to section 630 of the Omnibus Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202 (Dec. 21, 1987).[4] Most recently, the ISOO announced its intention

[3] This redefinition of "classifiable" applies only to the SF 189. Neither the DCI nor the DOD has adopted this definition of the term, and examination of the SF 4193 and DD 1847-1, therefore, must proceed as though the term had received no regulatory elaboration.

[4] In its May 27 memorandum and order, the Court struck down section 630 as an unconstitutional intrusion by the Congress upon the

to supersede SF 189 with an agreement that omits the phrases "classifiable" and "indirect unauthorized disclosure." [5] Letter from Steven Garfinkel to Representative Jack Brooks (June 16, 1988) (filed July 1, 1988).

The SF 4193 has undergone a less dramatic evolution. On March 18, 1988, the form was replaced with SF 4355 which eliminates reference to "classifiable" information. The prepublication review requirement and the phrase "indirect unauthorized disclosure" remain in the form. Neither the DCI nor the DOD has suggested that the form will undergo further modification.

Although these changes redound to the benefit of future signatories to the nondisclosure agreements, plaintiffs continue to assert their constitutional and statutory claims for those employees who signed the forms as they were originally drafted. Of course, plaintiffs continue to assert these claims as to the remaining portions of the amended forms that they consider offensive.

II. DISCUSSION

Of the four theories with which plaintiffs attack the nondisclosure agreements, the two that are premised on constitutional rights demand careful scrutiny by the Court. Additionally, these theories supersede plaintiffs' claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), because any violation of a constitutional right is necessarily "contrary to law." Because the

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power of the Executive to conduct this nation's foreign affairs. Mem. op. at 25-30.

[5] Although these proposed changes accommodate many of plaintiffs' concerns regarding the SF 189, the changes may not be considered by the Court in evaluating the lawfulness of the form. The changes have not been implemented, and any remedial effect of the changes on previously executed agreements is purely speculative.

premises of the APA claim are the alleged violations of the First and Fifth Amendment, resolution of the constitutional issues will be dispositive of the APA claim. Additionally, the relief appropriate, if plaintiffs prevail on their constitutional claims, would be the same under the APA. Finally, whether the nondisclosure agreements violate the statutorily guaranteed right of federal employees to communicate with Congress is a question the Court need not address. None of the plaintiffs claims that any obligation created by the agreements has been invoked to bar their communication with Congress.

A. The Constitutional Principles Applicable To The Nondisclosure Agreements

At the heart of this case is a constitutionally inherent conflict between the obligation of the Executive to safeguard national security information and the rights of citizens to speak freely and be guided by reasonably clear and narrow statutory proscriptions on the free speech right. Reconciliation of these competing interests is made more difficult in this case by the dual role of plaintiffs as citizens and members of the Executive Branch. *See United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 564 (1973). Executive employees unquestionably have an obligation to preserve the secrecy of national security information, *see Department of Navy v. Egan,* 108 S. Ct. 818, 824 (1988) (security clearance premised on trustworthiness of employee to protect sensitive information); *Snepp v. United States,* 444 U.S. 507, 510-11 & n.6 (1980) (per curiam) (employee with access to "secret" information enters special trust relationship with government); 5 U.S.C. § 7532 (Executive employee may be suspended if "necessary or advisable in the interests of national security"), and the President has

broad discretion to ensure that his employees are faithful to this obligation. *See Egan,* 108 S. Ct. at 824-25; *CIA v. Sims,* 471 U.S. 159, 170 (1985); *Cole v. Young,* 351 U.S. 536, 546 (1956) (summary suspension of employee in "sensitive" position justifiable); *U.S. v. Curtiss-Wright Corp.,* 299 U.S. 304, 320 (1936) (secrecy "may be highly necessary" and "premature disclosure . . . productive of harmful results"); 50 U.S.C. § 403(d)(3) (CIA entrusted to protect intelligence sources and methods). Supplementing this discretion are the government's

> interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.

Pickering v. Board of Education, 391 U.S. 563, 569 (1968).

Countervailing the substantial authority of the President in his national security domain are constitutional principles that preclude him from conditioning federal employment upon reliquishment of a constitutional right. *See Perry v. Sinderman,* 408 U.S. 593, 597 (1972). While no applicant for federal employment may demand a security clearance, *Egan,* 108 S. Ct. at 824, the Executive may not condition such clearance, which may be a prerequisite to employment, on execution of an agreement that unconstitutionally restricts the applicant's speech.

> The problem in any case is to arrive at a balance between the interests of the [employee], a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568. The weight of these interests is measured by complementary constitutional principles that

incorporate First and Fifth Amendment values. *See McGehee v. Casey,* 718 F.2d 1137, 1142-43 (D.C. Cir. 1983). Because censorship is inimical to free speech, the first of these principles requires that any "restriction[ ] on the speech of government employees must 'protect a substantial government interest unrelated to the suppression of free speech.' " *Id.* (quoting *Brown v. Glines,* 444 U.S. 348, 354 (1980) and citing *Snepp,* 444 U.S. at 509 n.3). The repugnance of overbroad and vague restrictions on free speech is embodied in the second principle which demands that any "restriction must be narrowly drawn to 'restrict speech no more than is necessary to protect the substantial government interest.' " *Id.* (quoting *Brown,* 444 U.S. at 355 and citing *National Association of Letter Carriers,* 413 U.S. at 580).

At issue in *Brown* were Air Force regulations that prohibited the solicitation of signatures on a petition within the confines of an Air Force base except by permission of the commanding officer. A related regulation barred the distribution of printed material without such permission. 444 U.S. at 349-50. In sustaining the regulations, the Supreme Court explained that First Amendment protections may be tempered by governmental interests:

> " 'Speech that is protected in the civil population may . . . undermine the effectiveness of response to command.' " *Parker v. Levy,* [417 U.S. 733, 759 (1974)], quoting *United States v. Priest,* 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972). Thus, while members of the military services are entitled to the protections of the First Amendment, "the different character of the military community and of the military mission requires a different application of those protections." *Parker v. Levy,* 417 U.S., at 758. The rights of military men must yield somewhat " 'to meet certain overriding demands of discipline and duty. . . .' " *Id.*, at

> 744, quoting *Burns v. Wilson,* 346 U.S. 137, 140 (1953) (plurality opinion). Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base. [*Greer v. Spock,* 424 U.S. 828, 840 (1976)]. . . .

444 U.S. at 354-55 (footnote omitted). The *Brown* Court concluded that the Air Force regulations violated by Glines were "reasonably necessary to protect the substantial governmental interest . . . and prevent[ed] commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale." *Id.* at 355.

While the nondisclosure agreements are intended to preserve the secrecy of classified information, not to maintain military discipline, the broader governmental interest served by these two purposes is nearly identical—the preservation of national security. Thus, while all governmental employees enjoy First Amendment rights, *Perry,* 408 U.S. at 597; *see Branti v. Finkel,* 445 U.S. 507, 514 (1980), those with access to classified information must accept a different application of free speech protections. Because the government's interest in safeguarding national security information is undeniably substantial and unrelated to the suppression of free speech, the Court focuses upon whether the challenged portions of the nondisclosure agreements are sufficiently precise to restrict no more speech than is necessary to serve the government's interest.[6] Any portion of the agreements that is vague or

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[6] There is no dispute that the government has no interest in censoring unclassified information. Defendants state repeatedly that the agreements by their language encompass only classified information. Because the agreements define classified information to include "classifiable" information, the defendants' statement begs a central question in this case.

overbroad necessarily fails this test. *See Cole v. Richardson,* 405 U.S. 676, 680-81 (1972).

B. The Constitutionality Of The Prepublication Review Requirement Has Been Established

In *Snepp v. United States,* 444 U.S. 507 (1980) (per curiam), the United States sought to enforce an agreement, signed by Snepp upon his entry into the CIA, in which Snepp promised "not to publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." *Id.* at 508. Affirming the lower courts' enforcement of the agreement, the Court rejected Snepp's claim that the agreement embodied an unconstitutional prior restraint:

> We agree with the Court of Appeals that Snepp's agreement is an "entirely appropriate" exercise of the CIA Director's statutory mandate to "protec[t] intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403(d)(3). 595 F.2d, at 932. Moreover, *this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.* . . . The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest.

Id. at 509 n.3 (emphasis added). This unequivocal state-

ment by the Supreme Court leaves no doubt that a prepublication requirement imposed upon government employees with access to classified information is entirely constitutional. That the agreement in *Snepp* covered only "secret" information and was executed only by CIA employees does not change the gravity of the government's interest in assuring the secrecy of national security information, nor do these distinctions render the agreements a less reasonable means for protecting that interest. Indeed, because the SF 4193, SF 4355, and DD 1847-1 require prepublication review only of documents relating to SCI, these agreements are more narrowly proscriptive of speech that [*sic*] the agreement in *Snepp*.

C. "Classifiable" Information

All the nondisclosure agreements involved in this case prohibit the unauthorized disclosure of classified information. As originally drafted, the SF 189, SF 4193, and DD 1847-1 defined classified information as information that is "classified or classifiable." In response to objections regarding the meaning of "classifiable," the ISOO elaborated several times upon the term as used in the SF 189. *See, e.g.*, 52 Fed. Reg. 48,367 (Dec. 21, 1987); 52 Fed. Reg. 29,793 (Aug. 11, 1987). Although the DCI never adopted these regulatory definitions of the term, it has superseded SF 4193 with a form that omits reference to "classifiable" information. No revisions of the DD 1847-1 have been brought to the Court's attention.

Regardless of regulatory definitions or revisions, the original versions of the forms were executed by many federal employees. Plaintiffs complain that because the ISOO's definition has not been distributed to each of the signatories to the SF 189, the agreement must be evaluated as though no such definition had taken place. Their rea-

soning is that the unconstitutional chill on First Amendment rights is threatened by the language of the agreement known to the signatory. Any definition given to "classifiable" beyond the four corners of the agreement has no bearing on the constitutional question because signatories to the agreement have not been notified of the definition.[7]

In addition to challenging "classifiable" as originally used in the agreements, plaintiffs contend that the ISOO's redefinition does not fully comport with constitutional requirements. They complain particularly that the latest definition impermissibly extends the scope of the SF 189 beyond information that the employee knows to be classified. Applying the agreement to information that the employee reasonably should have known to be classified requires the employee to make his own classification determination, and Executive Order 12,356 expressly restricts this power to a small group of designated officials. *See* Exec. Order 12,356 § 1.2. Further, plaintiffs object to imposition of liability for negligent disclosure of information.

1. ***"Classifiable" On Its Face Is Insufficiently Narrow To Survive Constitutional Scrutiny***

Although restraints on the free speech of federal employees has been condoned by the Supreme Court, the mechanism of restraint must be carefully tailored. *See Brown,* 444 U.S. at 355. Applying the nondisclosure agreements to "classifiable" information is permissible

[7] Constitutional scrutiny of the SF 4193 is unaffected by the ISOO's several redefinitions of "classifiable" because the DCI has not adopted them. Similarly, differences between the SF 4193 and SF 4355 are irrelevant because the omission of "classifiable" from the latter does not apply to the former. Thus, the Court must examine the term as redefined by the ISOO for the SF 189 and as used without elaboration by the DCI in the SF 4193.

only if the term is defined narrowly to include no more information than is necessary to further the government's need for secrecy. *See McGehee,* 718 F.2d at 1143 (citing *Brown*). As originally used in the SF 189, SF 4193, and DD 1847-1, "classifiable" benefitted from no clarifying definition. Employees who executed the forms were left to assign their own meaning to the term.

On its face, "classifiable" has no readily discernible meaning. Indeed, prior to his promulgation of definitions in the Code of Federal Regulations, the Director of the ISOO apparently admitted that "arguably it could mean anything." Letter from Representative Gerry Sikorski to Frank Carlucci 2 (June 24, 1987) (quoting ISOO Director Steven Garfinkel). At its broadest, the term applies to any information that would be classified if examined by a classification authority. Within this broad definition is information that does not become classified until its disclosure piques the concerns of the Executive. Also included is information that becomes classified in the future though only speculation would have suggested that such classification would occur.

From this extreme end of the spectrum of definitions, numerous successively narrower definitions could be given. Any one of these definitions might reasonably have been adopted by federal employees executing the SF 189, SF 4193, or DD 1847-1. Given this array of definitions, the Court cannot conclude that applying the obligations of the nondisclosure agreements to "classifiable" information is a mechanism that "restrict[s] speech no more than is necessary to protect the substantial government interest." *Brown,* 444 U.S. at 355.

2. *"Classifiable" As Definied For The SF 189*

Before these lawsuits were filed, plaintiffs made known to the ISOO their concerns regarding the language of the

nondisclosure agreements. A regulatory definition of "classifiable" and a refinement of that definition were promulgated, purporting to address some of these concerns. The most recent of these states:

> (i) . . . [T]he term "classifiable information" refers to two categories of information only: (a) Unmarked *classified* information, including oral communications; and (b) *unclassified* information that meets the standards for classification and is in the process of a classification determination. "Classifiable information" does *not* refer to currently unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination. Therefore, the only circumstances under which a party to SF 189 might violate its terms by disclosing *unclassified* information are when a party knows, or reasonably should know, that such information is in the process of a classification determination and requires interim protection. . . .
>
> (ii) A party to SF 189 may be liable for disclosing "classifiable information" only if: (a) He or she knows that the unmarked information is classified, or meets the standards for classification and is in the process of a classification determination, whether the unauthorized disclosure is willful or negligent; or (b) he or she should know that the unmarked information is classified, or meets the standards for classification and is in the process of a classification determination, in which case the unauthorized disclosure is negligent. In no instance could a party to SF 189 be liable for violating its nondisclosure provisions by disclosing unmarked information when, at the time of the disclosure, there was no basis to suggest, other

> than pure speculation, that the information was classified or in the process a classification determination.

52 Fed. Reg. 48,367 (Dec. 21, 1987) (emphasis in original) (amending 32 C.F.R. § 2003.20(h)(1)). Unlike "classifiable" on its face, this regulatory definition of the term certainly would guide SF 189 signatories in fulfilling their obligations under the agreement. Plaintiffs complain, however, that liability for negligent disclosure or for disclosure of information the employee should reasonably know to be classified is not a narrowly drawn means for protecting the government's substantial interest in protecting national security. They insist that liability must be based on scienter or intent.

Were plaintiffs correct, the government would be empowered to punish with civil sanctions only intentional disclosures of information the employee know to be classified or knew to be in the process of a classification determination and to meet the standards for classification. By necessity, however, much classified information is not marked as such because it has not been examined by a classification authority. The government nevertheless has a substantial interest in safeguarding that information. Plaintiffs' suggested construction of "classifiable" draws too narrowly the bounds of the nondisclosure agreements.

The definition offered by the ISOO simply requires that employees consider whether they have reason to believe that unmarked information is classified or should be classified and is in the process of becoming so. The reasonable person standard is one to which people are held in all their activities, and it does not become unconstitutionally vague simply because First Amendment rights are involved. Indeed, it is as precise as possible given the vast array of information possessed by the government. Thus, the ISOO's regulatory definition of "classifiable" information does not violate constitutional norms.

The value of this constitutionally permissible definition is limited, unfortunately, because it is unlikely that those employees who have signed the SF 189 have been informed of the definition. Until an employee becomes aware of the regulatory definition, he cannot know that "classifiable" information does not include, for example, information that only speculation suggests will become classified. So long as signatories to the SF 189 are unaware of the ISOO definition of "classifiable," constitutional norms do not allow them to be liable for any disclosure of such information. Notice of the definition is essential.

The obvious remedy for this lack of notice is distribution of the regulatory definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1). The ISOO, DCI, and DOD may choose whatever mechanism for distribution they deem most efficient; the mechanism simply must deliver as soon as practicable a copy of section 2003.20(h)(1) to every employee who has or will sign a nondisclosure agreement using the word "classifiable." Until such distribution occurs, the agreements may not be enforced to penalize disclosure of "classifiable" information. Alternatively, these agencies may choose to distribute a notice that deletes "classifiable" from the agreements and states that no employee shall be liable for disclosure of "classifiable" information.

D. "Indirect Unauthorized Disclosure"

Plaintiffs' final constitutional objection to the nondisclosure agreements regards the admonition that "indirect unauthorized disclosure" of classified information or SCI "could cause irreparable injury to the United States or be used to advantage by a foreign nation." SF 189 ¶ 3; SF 4193 ¶ 3; DD 1847-1 ¶ 3. Following this warning, the agreements elicit a promise from the employee not to

"divulge such information to anyone who is not authorized to receive it without prior written authorization." *Id.* Repeating their First and Fifth Amendment arguments, plaintiffs insist that the term is broader than necessary to protect the government's substantial interest in the secrecy of classified information.

At first glance, plaintiffs' argument is sensible because a promise not to divulge indirectly any classified (or classifiable) information imposes absolute liability upon the employee for any unauthorized disclosure. Closer scrutiny, however, reveals that while it may be unfair to hold an employee absolutely liable, First Amendment rights are not implicated. The freedom of federal employees to speak freely is impaired by limitations on the content of their speech. Thus, an overly broad definition of "classifiable" is constitutionally unacceptable. However, if federal employees have no constitutional right to disclose certain information, they cannot complain that disclosure is absolutely prohibited. Accordingly, no constitutional concerns are raised by the use of the term "indirect unauthorized disclosure."

E. Plaintiffs Fail To State A Claim Under 5 U.S.C. § 7211

Wholly part from their constitutional claims, plaintiffs in *AFGE* insist that the nondisclosure agreements violate their statutory right as federal employees to communicate with Congress. The right has been assured for many years, and in its most recent incarnation, the relevant statute provides:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

5 U.S.C. § 7211. Plaintiffs argue that the nondisclosure agreements interfere with the right guaranteed by this statute.

In order to state a claim for relief under this statute, plaintiffs must at least allege that they have disclosed or intend to disclose some classified or classifiable information to Congress and have been threatened with enforcement of the nondisclosure agreements. No such allegation appears in the complaint. Apparently, the *AFGE* plaintiffs hope to rely upon the unusually liberal construction accorded claims under the First Amendment. This liberality allows the chilling effect of anticipated governmental action to form the basis for a claim under the First Amendment. *See Laird v. Tatum,* 408 U.S. 1, 11 (1972); *National Federation of Federal Employees v. United States,* Civil Action No. 87-2284, mem. op. at 23-24 (D.D.C. May 27, 1988). There is no justification, however, for so liberally construing the statutory claim asserted by plaintiffs. Because plaintiffs in *AFGE* fail to state an essential element of their claim in count V, summary judgment for defendants is proper. *See District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1078 (D.C. Cir. 1984).

III. CONCLUSION

In order to add civil sanctions to its arsenal of weapons protecting national security information, the government requires its employees with access to classified information to sign a nondisclosure agreement. Plaintiffs challenge three aspects of the forms as unconstitutional or contrary to statute. Regarding plaintiffs' resistance to the prepublication review requirement in the SF 4193 and DD 1847-1, the Supreme Court has already determined that such a requirement is consistent with the First Amendment rights of federal employees.

A novel issue is raised, however, regarding use of the term "classifiable" to describe information the disclosure of which is prohibited by the agreements. In the absence of any definition, the term is far too broad to comport with the constitutional requirement that restraints on free speech be narrowly drawn to bar no more speech than is necessary. Because no such definition has been offered with respect to the SF 4193 and DD 1847-1, use of the term in those forms is unconstitutional. While the definition promulgated by the ISOO is appropriately narrow, it has never been published to signatories of the SF 189. The constitutional infirmity in all the forms may be remedied by distribution of the ISOO's definition of "classifiable" to any federal employee who has signed or will sign an agreement incorporating that term. Until these federal employees are informed of the refined definition of classifiable, the agreements may not be enforced for disclosures of classifiable information. Alternatively, a notice may be distributed stating that "classifiable" is retroactively deleted from all agreements.

Plaintiffs' final constitutional claim concerns the proscription in the agreements against "indirect unauthorized disclosure" of classified (or classifiable) information. Though successful regarding the term "classifiable," First and Fifth Amendment arguments have no force when applied to the phrase "indirect unauthorized disclosure." At its broadest, the phrase imposes absolute liability on an employee who may be linked to the disclosure of classified (or classifiable) information. Although this may be unfair, it has no First or Fifth Amendment implications. If an employee has no right to disclose certain information, he cannot complain that the government entirely prohibits such disclosure.

Finally, the Court grants summary judgment for defendants on the claim in *AFGE* that the agreements violate

5 U.S.C. § 7211. While plaintiffs certainly have a statutory right to communicate with Congress, they fail to allege that the right has been violated. At most, they anticipate such a violation, but such an allegation is insufficient to state a claim under this statute.

/s/ OLIVER GASCH
United States District Judge
Oliver Gasch

Date: July 28th, 1988

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